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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

NAHEEM EUGENE LANGLEY,

Defendant and Appellant.

C056587

(Super. Ct. No.  
CRF070035)

Defendant challenges his upper-term sentence on one of two felony counts, generally claiming the sentence violates his Sixth Amendment right to a jury trial. We shall affirm.

A jury convicted defendant of several crimes based on the following facts. At about 5:00 p.m. on December 31, 2006, defendant's tractor-truck (a "big rig") was stopped by the California Highway Patrol in Oakland (Alameda County). After the officer instructed him to shut off his engine, defendant fled, driving the wrong way on a street, running a stop sign and a red light and causing a traffic accident. (Veh. Code, § 2800.2, subd. (a) [count one, reckless evasion of a peace

officer].) At one point defendant drove towards San Francisco, but then drove across many lanes of traffic at the Bay Bridge toll plaza and turned around. Defendant took Interstate 80 and turned north onto US 505, then left the highway and drove onto Putah Creek Road (Yolo County), where he drove on the wrong side of the road directly at another CHP vehicle, forcing that officer to back up. (Pen. Code, § 245, subd., (c) [count two, assault with a deadly weapon on a peace officer].) Defendant ran stop signs and eventually ran off the road and his truck became stuck in the mud. Although he at first got out and raised his hands in the air in response to police commands, he then ran back into his truck. (Pen. Code, § 148, subd. (a)(1) [count four, misdemeanor resisting a peace officer].) His passenger tried to get out, but defendant pulled her back and began punching her. (Pen. Code, § 242 [count three, misdemeanor battery].) Testing showed he had cocaine and marijuana in his system, and defendant admitted to an officer that he had been drinking "during the pursuit." (Veh. Code, § 23152, subd. (a) [count five, misdemeanor driving under the influence of drugs].)

Defendant was sentenced to the upper term of five years for the felony assault, and a consecutive one-third the midterm of eight months for reckless evasion. He was given jail time for the three misdemeanors, with credit for time served. Defendant timely filed his notice of appeal.

According to the probation report, defendant had three prior felony convictions, for robbery (2003), possession for sale of drugs and knowing possession of stolen property (both in

1993), as well as a misdemeanor possession of stolen property conviction (1997). Because defendant did not challenge the probation report, we presume it is accurate. (See *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021.)

At sentencing on July 31, 2007, defendant argued for a *five* year sentence, asking that the two felonies be treated as a single course of conduct under Penal Code section 654. In other words, trial counsel *did not object to the anticipated upper term sentence*. The trial court rejected the Penal Code section 654 claim, finding the assault with the truck was a separate act from the reckless evasion. The trial court selected the upper term for assault with a deadly weapon, stating it "adopts the analysis and rationale" of the probation report. The probation report had stated in aggravation that defendant had "serious" prior convictions and he had served a prison term, and in mitigation that he had performed satisfactorily on parole.<sup>1</sup>

The California Supreme Court has held that a single valid aggravating fact makes a defendant "eligible" for the upper

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<sup>1</sup> We note that the trial court incorporated reasons from the probation report, instead of articulating reasons on the record, as has been required since the inception of the Determinate Sentencing Law over 30 years ago. (Pen. Code, § 1170, subd. (c); *People v. Pierce* (1995) 40 Cal.App.4th 1317, 1319-1320; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 679 ["merely incorporating the probation report by reference violates the spirit of the sentencing laws and fails to properly explain the basis for any sentencing choice"]; *People v. Turner* (1978) 87 Cal.App.3d 244, 247.) Defendant does not challenge this evident mistake in his opening brief. But in future, the trial court should state its sentencing reasons on the record, as required.

term, and that prior convictions and prior prison terms do not need to be submitted to the jury in order to be used as an aggravating factor. (See *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*); *People v. Black* (2007) 41 Cal.4th 799 (*Black*); *People v. Sandoval* (2007) 41 Cal.4th 825.) Defendant acknowledges that based on these decisions, we are bound to reject most of his claims. Accordingly, we do not address his many criticisms of the holdings and reasoning of these cases as we are bound to follow them.<sup>2</sup> (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

However, defendant raises a few claims he insists are not foreclosed by precedent. We disagree with defendant.

Defendant observes that the probation report characterized his prior convictions as "serious." In his view, this means the trial court, by adopting that report, sentenced him not based on the objective *fact* that he had prior convictions, but on the subjective opinion that his record was "serious." That subjective evaluation by the trial court, defendant asserts, could not be used to aggravate his sentence.

Defendant mentions but discounts the fact that the term "serious" is not necessarily a subjective opinion that that prior is worse than others, it may be an objective conclusion that that prior meets the statutory definition of "serious."

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<sup>2</sup> Defendant preserved his attacks on these cases for further review and we see no purpose in responding to them in detail.

Defendant's robbery conviction was a "serious" prior as a matter of law. (Pen. Code, § 1192.7, subd. (c)(19).)

More importantly, defendant's record (including three felonies and a prison term) made him *eligible* for the upper term without the need to submit any other facts to the jury for determination. (*Black, supra*, 41 Cal.4th at p. 816; *People v. Stuart* (2008) 159 Cal.App.4th 312.) And whether defendant's record was "serious" was not itself a fact requiring a jury trial. (*Id.* at pp. 818-820.)

Defendant points out that the probation report states that if the officer had not moved his car quickly, the charges could have been more "severe." This comment was not a listed aggravating fact. The record does not support defendant's suggestion that the trial court imposed the upper term because of crimes or results that did not happen.

Finally, defendant contends the determination that aggravating facts outweigh mitigating facts must be made by a jury using the beyond-a-reasonable-doubt standard, and that this claim is not foreclosed by precedent because there were "no mitigating factors" in *Towne, supra*, 44 Cal.4th 63. Defendant has not read *Towne* carefully. *Towne* held that the process of weighing aggravating and mitigating factors is not factfinding that must be done by the jury "in a case, such as this one, in which mitigating factors exist" (p. 86, fn. 9), therefore this claim, too, is foreclosed by precedent. (See also *Black, supra*, 41 Cal.4th at p. 814, fn. 4.)

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_, MORRISON, J.\*

We concur:

\_\_\_\_\_, DAVIS, Acting P. J.

\_\_\_\_\_, ROBIE, J.

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\* Retired Associate Justice of the Court of Appeal, Third Appellant District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.